IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5160 of 2004

For Approval and Signature:

HON'BLE MISS JUSTICE R.M.DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

PURVI CONSTRUCTION AND ANOTHER

Versus

YASWANTBHAI AMBALAL PATEL - SELF& KARTA OF HIS HUF AND OTHERS

Appearance:

1. Special Civil Application No. 5160 of 2004

MR SURESH M SHAH for Petitioners Nos. 1-2/3

MR ALKESH R BHATT for Respondent No. 1

MR AJAY B MANIAR for Respondent No. 1

MR KV SHELAT for Respondents Nos. 2-3

CORAM : HON'BLE MISS JUSTICE R.M.DOSHIT

Date of decision: 29/04/2004

ORAL JUDGEMENT

Heard the learned advocates.

The petitioners, defendants in Civil Suit No.5558/1986, challenge the order dated 21st July, 1997 made by the learned City Civil Judge, Ahmedabad below application Ex.93.

The respondents - plaintiffs have instituted the aforesaid Civil Suit No.5558/1986 for declaration that the suit cellar was not sold to the defendants and that the defendants' possession of the suit cellar is illegal as the defendants are the trespassers in the suit cellar and for mesne profits. Pending the suit on 18th November, 1996 the plaintiffs moved application Ex.93 for amendment to the plaint. By the said application the plaintiffs sought amendment of the plaint, inter alia, by adding the relief for recovery of possession of the suit cellar. The plaintiffs accordingly revalued the suit and paid the deficit court fees.

The said application was contested by the defendants mainly on the ground that the aforesaid relief sought to be added by the proposed amendment had become time-barred on the date of the application. The learned City Civil Judge, by impugned order dated 21st July, 1997, allowed the application Ex.93. Feeling aggrieved, the defendants have preferred the present petition.

Learned advocate Mr.Shah has appeared for the petitioners and has submitted that the suit for declaration has, by impugned amendment, been converted into one for possession. A suit for recovery of possession should be instituted within 12 years from the date the possession of the defendants became adverse to the plaintiffs. The defendants' possession of the suit cellar became adverse to the plaintiffs in the month of October, 1983. Thus, by 18th November, 1996 the relief for recovery of possession had become time-barred. Such relief could not have been permitted to be added after it became time-barred. In support of his contentions, Mr.Shah has relied upon the judgments of the Hon'ble Supreme Court in the matters of Tarlok Singh v/s. Vijay Kumar Sabharwal [JT 1996(4) SC 245] and of Muni Lal v/s. The Oriental Fire & General Insurance Company Ltd. and another [AIR 1996 SCC 642].

The petition is contested by the learned advocate Mr.Shelat. He has submitted that the suit was one for declaration that the defendants were the trespassers in

the suit cellar. The prayer for recovery of possession of the suit cellar is a mere consequential relief and such a relief should be permitted to be added even at a later stage. In support thereof, he has relied upon the judgment of the Hon'ble Supreme Court in the matter of Sampath Kumar v/s. Ayyakannu and another [(2002) 7 SCC 559] and in the matter of Ragu Thilak D.John v/s. S.Rayappan & Others [JT 2001(2) SC 11]. He has submitted that the Hon'ble Supreme Court has held that the pretrial amendment should be allowed more liberally. In the present case, by the impugned amendment no prejudice shall be caused to the defendants. Therefore also the amendment has rightly been allowed.

Both the aforesaid judgments in the matters of Tarlok Singh (supra) and Muni Lal (supra) arose from the final judgment and decree passed by the trial Court.

In the matter of Tarlok Singh (supra) the application for amendment seeking specific performance of the agreement was made in the year 1979 which came to be allowed in the month of August, 1989. Considering these dates, the Hon'ble Court observed that, "...The suit for specific performance in fact was claimed by way of amendment application filed under Order 6, Rule 17 CPC on September 12, 1979. It will operate only on the application being ordered. Since the amendment was ordered on August 25, 1989 the crucial date would be the date on which the amendment was ordered by which date, admittedly, the suit is barred by limitation. The courts below, therefore, were not right in decreeing the suit."

In the matter of Muni Lal (supra), initially the suit was filed for declaration. The consequential relief for payment of compensation was added by an amendment made before the first Appellate Court. However, the decree for payment of compensation was refused being time-barred. The Hon'ble Supreme Court upheld the decision of the first Appellate Court and the High Court. It was observed that, "...The amendment to grant consequential relief sought for in this case, is as envisaged in proviso to Section 34 of the Specific Relief Act, 1963. That relief was, however, available to him, to be asked for, when the suit was filed"...."Admittedly, by the date of the application for amendment filed, the relief stood barred by limitation. The question, therefore, is whether the Court would be justified in granting amendment of the pleadings in such manner so as to defeat valuable right of defence of bar of limitation given to the defendant"...."we are of the view that granting of amendment of plaint seeking to introduce

alternative relief of mandatory injunction for payment of specified amount is bad in law. The alternative relief was available to be asked for when the suit was filed but not made. He cannot be permitted to amend the plaint after the suit was barred by the limitation during the pendency of the proceeding in the appellate court or the second appellate court."

In the matter of Sampath Kumar (supra), the Hon'ble Court has observed that, "...The question of delay in moving an application for amendment should be decided not by calculating the period from the date of institution of the suit alone but by reference to the stage to which the hearing in the suit has proceeded. Pre-trial amendments are allowed more liberally than those which are sought to be made after the commencement of the trial or after conclusion thereof. In the former case generally it can be assumed that the defendant is not prejudiced because he will have full opportunity of meeting the case of the plaintiff as amended."

In the matter of Ragu Thilak (supra), the Hon'ble Court observed that, "...The dominant purpose of allowing the amendment is to minimise the litigation. The plea that the relief sought for by way of amendment was barred by time is arguable in the circumstances of the case, as is evident from the perusal of averments made in paras 8(a) to 8(f) of the plaint which were sought to be incorporated by way of amendment. We feel that in the circumstances of the case, the plea of limitation being disputed could be made a subject matter of the issue after allowing the amendment prayed for."

As observed in the quote reproduced in the matter of Ragu Thilak (supra), "...The purpose and object of Order 6, Rule 17 CPC is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. The power to allow the amendment is wide and can be exercised at any stage of the proceedings in the interests of justice on the basis of guidelines laid down by various High Courts and this Court."

The power to grant amendment is discretionary. The order allowing such amendment shall not detain the attention of this Court at this stage. On the facts of the present case, the dispute as to the bar of limitation with respect to the relief sought to be added by the impugned amendment is a mixed question of law and fact. Such question can be decided on the basis of evidence on record. It is not disputed that the trial has not yet begun. On the facts and in the circumstances of the

case, I believe the ends of justice shall be met if the petitioners - defendants are allowed to raise dispute as to the bar of limitation with respect to the relief of recovery of possession and if such issue is decided on the basis of the evidence recorded. Besides, the impugned order allowing the amendment can be challenged in appeal against the final decision at the trial, if need be.

In view of the above observation the present petition is dismissed. Rule is discharged. Ad-interim order stands vacated. There shall be no order as to costs.

It is clarified that the petitioners - defendants shall be at liberty to raise the plea of bar of limitation with respect to the reliefs added by the impugned amendment. If such plea is raised the trial Court shall frame appropriate issue and decide the same in accordance with law. It is further clarified that in the event of the plaintiffs succeeding in the suit the defendants shall be at liberty to challenge the impugned amendment in appeal against the final decision in the suit.

(Ms. R.M.Doshit, J.)

/sakkaf